Filed 9/20/06 P. v. Perez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BALDEMAR PEREZ,

Defendant and Appellant.

F048495

(Super. Ct. No. 04CM0295)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Kat Kozik, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jose Baldemar Perez was found guilty of the first degree murder of Paul Lemos. In addition, two special circumstances were found true: the murder was committed during an attempted robbery and the murder was committed to further the activities of a criminal street gang. Numerous enhancements were also found true, including several gun enhancements.

Defendant appeals, claiming the accomplice testimony was not sufficiently corroborated, the robbery felony-murder special circumstance is constitutionally suspect, and the court erred in the manner it sentenced defendant on the enhancements. Except to order the striking of enhancements pursuant to Penal Code[1] sections 12022.5 and 186.22, we affirm the judgment.

Facts

A. *Background*

Defendant, Jose Guzman, Eduardo Hernandez, and Laura Holt were all charged with the first degree murder of Paul Lemos. After being arraigned, Holt wanted to talk to law enforcement officers. She reached a plea agreement with a prison term of 13 years in exchange for her truthful testimony at the trials of her codefendants. Guzman and Hernandez were tried together and both were convicted of murder and additional allegations.[2] Defendant was tried separately and is the subject of this appeal. The jury was told that Holt was an accomplice as a matter of law and that her testimony required corroboration.

B. *Accomplice Testimony*

Laura Holt was with defendant, Hernandez, and Guzman on December 29, 2003. They spent part of the evening drinking at someone's house in Laton, and then Holt drove the group in her car to a basketball game in Riverdale. As it turned out, they did not attend the game; after a short period of time, they returned to Laton and went to the home of Jose Rodriguez (a.k.a. Huero).

Holt, Hernandez, Guzman and defendant smoked methamphetamine with Rodriguez, joined by Anthony Ruelas (a.k.a. Crack). Hernandez, Guzman and defendant began talking about robbing someone. Guzman asked Rodriguez for a gun. Rodriguez did not want to

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[1] All statutory references are to the Penal Code.

[2] Guzman (F048683) and Hernandez (F049209) have appealed their convictions.

give it to him. Guzman told Rodriquez that he was not going to shoot the gun; he only needed it to scare someone while he robbed them. Rodriguez gave the gun to Guzman.

Holt was shown exhibit 32 at trial, a gun, and she testified it looked like the gun Rodriguez gave to Guzman.

Holt, Hernandez, Guzman and defendant left in Holt's car. Holt was driving. They drove around trying to decide where to go to rob someone. While driving around, defendant, Guzman and Hernandez talked about the robbery. They discussed stealing a vehicle with a stereo system. They drove to Hanford to find their target. They drove around the Hanford mall parking lot to look at cars. They did not find anything that suited their purposes.

Discussions continued and defendant said he wanted to do a carjacking. Hernandez wanted to do a home invasion. Guzman did not join in this discussion. The gun was passed around among the three men. Guzman and defendant argued over who was going to possess the gun. Guzman finally let defendant have his way and possess the gun. The gun had been loaded previously in the car by Guzman with defendant's assistance.

The group then drove to a residential area and looked around. Again finding nothing, they returned to the area of the mall. They saw a blue Chevrolet truck, lowered, with tinted windows, driven by Paul Lemos, the victim. Hernandez liked the truck and told Holt to follow it. She did. Holt parked her car nearby while Lemos went through the drive-through at Taco Bell and purchased food.

Holt continued to follow the truck. At one stop light the victim's truck was next to another nice truck. The group decided that the victim's truck was the nicer of the two. Defendant got out and started to go towards the truck when Guzman and Hernandez told defendant to get back in the car.

They followed the victim in his truck until the victim arrived at his house. Holt backed the car up and stopped at the end of the street. She could not see the truck from her location. Defendant and Hernandez ran towards the truck. Hernandez told Holt to follow

them after they obtained the truck. Guzman got out shortly afterwards and stood near the car. Holt was not sure if Guzman stayed near the car because Holt was feeling ill from the drugs and was not paying attention. She kept the engine running.

Holt heard two gunshots. Guzman got in the car. Defendant and Hernandez ran to the car and got in. They were out of breath and told Holt to take off. She did.

In the car, Hernandez complained that he was punching the victim, the victim was crying, but the victim would not give up any of his belongings. Hernandez also told defendant he should have used his hands and taken something from the victim. Defendant stated that he thought he shot the victim in the shoulder and missed with the other two shots. Holt was surprised that defendant mentioned three shots because she only heard two.

Holt drove the group back to Laton. She was told not to say anything. Holt dropped defendant off at his house so he could change his clothes and wash up to get rid of any gun residue. Holt, Hernandez, and Guzman drove back to Rodriguez's home and again used drugs. Ruelas was still there. Defendant showed up shortly thereafter. The group stayed there about an hour. During this time the gun was returned to Rodriguez. They then decided they would go to Fresno to try and find some more drugs. Their trip was unsuccessful and they returned to the home of Rodriguez and used more drugs.

Holt, Hernandez, Guzman and defendant left in Holt's car. They were stopped by police. When they were stopped, Hernandez ran and was not captured. The others discussed their alibi. They decided they would say that Holt had picked them up from City Lights in Fresno. Guzman came up with a name he would use. Officers removed them individually from the car and separated them. They were eventually allowed to leave. Holt went with Guzman to Guzman's brother's house.

Two months before trial, Holt was in a holding cell. Defendant, Hernandez, and Guzman were being held in the same area. Defendant asked Holt to take back her deal and not testify.

C. *Nonaccomplice Evidence*

Christina Padilla knew the victim. On December 29, 2003 she had a cellular telephone conversation with Lemos while she was riding in a van. She heard a scream and a deep exhale. She called his name but there was no answer. She heard the beeping sound of his truck that is made when the door is open and the keys are left in the ignition. When she was talking to him on the telephone, she did not hear him threaten anyone or challenge anyone to a fight.

Diana D. lived next door to Lemos. On the night of December 29, 2003 she was outside replacing a light bulb. She heard someone say, "Fuck you, bitch, you fuckin' scrap." She turned because she thought the person was talking to her. She saw Lemos standing by the door to his truck. Two men were standing near each other by the back of the truck. One of the individuals had a gun pointed sideways at Lemos. Diana went inside of her house. She heard three shots. She looked out and saw Lemos fall to his knees in the driveway; the other individuals ran away. She heard two car doors and heard a car "screech off." She came out of her house and saw Lemos on the ground holding the back of his head and making moaning sounds.

When Donaldson first spoke to an investigator that evening, she told them she did not see anything. She did not want to be a "rat" and did not want the individuals to come after her. Later that evening, Donaldson told officers what she witnessed.

Donaldson identified defendant at trial as the person she saw standing by the victim's truck with the gun at the time the victim was shot.

Shirley Villagran was driving by the park and went past a small white car parked on the street. She drove farther down the street and parked on the street near the victim's house so she could talk with a friend in the car. She heard two gunshots. She saw one person get in the car. The car took off with the headlights off. Villagran followed them trying to get their license number. She stopped following the car because she was afraid. She went back to the area and told law enforcement officers what she had seen.

Hanford police officer Richard Pontecorvo responded to the scene of the murder.[3] The truck was parked in the driveway. The driver's door was open, there was a Taco Bell bag on the ground as well as a Taco Bell cup. A cellular telephone was on the ground by the truck. The keys were in the ignition of the truck. The expensive stereo system in the truck was not missing. There were no shell casings in the area.

At 3 a.m. on December 30, 2003, Pontecorvo observed a vehicle that matched the description of the vehicle leaving the crime scene. Pontecorvo followed the vehicle. The occupants of the vehicle kept looking back at Pontecorvo as he followed it. Pontecorvo stopped the vehicle. One person fled the scene. He removed the other three occupants of the car. Holt was the driver of the car. Guzman was seated in the front passenger seat; he misidentified himself as Alex Gutierrez. Defendant was in the rear passenger seat. Holt said that she had picked up the men from City Lights in Fresno.

Lemos died from a single gunshot wound to the left side of his head. In addition, he had swelling to his right eye that was not consistent with a gunshot wound but was consistent with blunt force trauma. A deformed slug was recovered from the victim's brain.

Several days after the murder, a search was conducted at the home of Rodriguez. Rodriguez was there, as was Ruelas. In addition, Manuel Tapia and Raul Gonzalez were there. Officers found weapons, ammunition, drugs, and drug paraphernalia. Rodriquez said that he gave the gun to Guzman for protection but the gun was never returned to him.

Ruelas agreed to talk to law enforcement.[4] He said that Rodriguez sold the gun to Raul Gonzalez. Ruelas also said that after the shooting Hernandez, Guzman, Holt, and

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[3] The victim did not die at the scene; he died several days later.

[4] At trial, Ruelas was called as a witness. He was asked questions on the witness stand and he denied talking to the police and denied having any knowledge regarding anything to do with this crime. His prior statement to officers was admitted as impeachment and as a prior inconsistent statement. Defendant contends the prior inconsistent statement of Ruelas was inadmissible and should not be considered as corroborative proof to the testimony of the accomplice (Holt) because Ruelas refused to take the oath to testify. Acknowledging that he

defendant discussed the incident. The group was jittery and excited. Hernandez explained that they were going to carjack the truck. Hernandez was hitting the victim when Ruelas heard a shot. Defendant had the weapon. They ran. Ruelas told the officers that the gun was at the home of Raul Gonzalez.

The home of Raul Gonzalez was searched. The weapon was not found. Several days later Raul's brother, Robert Gonzalez, turned a weapon over to law enforcement. Robert Gonzalez is also the uncle to Manuel Tapia, one of the individuals at the home of Rodriquez when it was searched for the weapon. He said he had received a call regarding the location of the gun. He went to the location and found the gun in a paper bag by the side of the road. He refused to provide any further details about the gun.

A criminalist test-fired the gun turned in by Robert Gonzalez. Because the gun was worn and old he was not able to get nice crisp characteristics to compare to the fragment recovered from the victim, but the bullets agreed as far as land, grooves and twists and the bullet retrieved from the victim was consistent with being fired from the gun.

Ralph Paolinelli, an expert on the Laton Bulldogs gang, testified that scrapa is a term used by Norteno Bulldogs to disrespect Surenos. The Laton Bulldogs do not align with either the Sureno or Norteno gangs. An officer searched the victim's bedroom. There was no indication in the room that that victim had any type of gang affiliation.

Prior to trial, defendant admitted all gang-related enhancements, including the gang special circumstance.

DISCUSSION

I. Corroboration of Accomplice Testimony

Defendant contends the evidence was insufficient to corroborate the testimony of accomplice Holt on the question of whether there was an attempted robbery of the victim. It

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did not object to the admission of Ruelas's unsworn testimony, defendant argues that an objection would have been futile and, if an objection would not have been futile, it was ineffective assistance of counsel to not properly preserve the claim of error.

is argued that there is nothing about the shooting itself that would rationally support a finding that the shooting occurred during an attempted robbery. Defendant asserts the error requires reversal of the special circumstance and the murder conviction because if the attempted robbery was not corroborated it is impossible to tell which theory the jury relied on to find first degree murder (felony murder or express malice murder) and the evidence does not support the attempted robbery special circumstance.

"A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.) In addition, "[w]hen the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177.)

Although the issue is argued by defendant as one of corroboration, the question is whether the evidence, absent Holt's testimony, was sufficient to support an inference that an attempted robbery had taken place. Defendant argues that the circumstances of the shooting fail to rationally support an inference that the shooting occurred during an attempted robbery.

We find the first question that must be answered is whether the People proved the corpus delicti of the attempted robbery without resort to evidence emanating from the accomplice. "'"The corpus delicti of a crime consists of two elements, the fact of the injury or loss or harm, and the existence of a criminal agency as its cause." [Citation.] Such proof, however, may be circumstantial and need only be a slight or prima facie showing "permitting the reasonable inference that a crime was committed." [Citation.]' [Citation.] '[T]he quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest….' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 985-986.)

In arguing that the evidence does not support the inference that an attempted robbery took place, defendant attempts to distinguish *People v. Rodrigues* (1994) 8 Cal.4th 1060, arguing that what occurred here did not justify the jury's determination that an attempted robbery had taken place. In *Rodrigues* the defendant was convicted of murder and other crimes. In addition, two special circumstances were found true: the murder was committed while the defendant was engaged in the crime of attempted robbery and while the defendant was engaged in the crime of burglary. The defendant, Garcia and Ontiveros went to the apartment of Zavala and Barragan with the intention to rob them. Ontiveros went to the apartment and spoke to Zavala, who was her drug connection. Ontiveros returned to the defendant and Garcia and told them Zavala did not have drugs, but he had money. Garcia armed himself with a crowbar and the defendant armed himself with a knife. The group went to the apartment. After Garcia entered the apartment and hit Zavala on the head with the crowbar, Ontiveros fled because she became scared. Ontiveros testified as an accomplice to the above facts at defendant's trial.

Barragan died, but Zavala survived the attack. Zavala testified that Garcia struck him repeatedly with a tire iron. The defendant and Barragan engaged in a struggle and Barragan was stabbed and killed. During the attack Garcia said to Zavala, "'Calm down, damn it, where do you have it?'" Zavala lied and said "it" was in the closet. Defendant told Garcia to finish Zavala too. Garcia again attacked Zavala with the tire iron. The telephone rang and the defendant said, "'Well let's get out of here the police might going to come [*sic*].'" Two neighbors saw defendant and Garcia leave. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1095-1097.)

In *Rodrigues*, the defendant conceded that there was sufficient evidence to corroborate accomplice Ontiveros's testimony regarding the murder, but he claimed the evidence did not adequately connect him with an attempted robbery or burglary. "Focusing on the circumstances testified to by Zavala, defendant argues that the unadorned question -- 'where do you have it?'--does not in itself reflect any intent or attempt to commit the crime

of robbery or burglary. In his view, the question is an ambiguous and essentially meaningless question if considered without aid or assistance from Ontiveros's testimony and statements." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1129.)

The court rejected the defendant's argument. "Even though the attackers were not specific in demanding money or drugs, the totality of circumstances testified to by Zavala, even apart from Ontiveros's testimony, clearly justified the jury's determination that an attempted robbery and burglary had taken place. (See, e.g., *People v. Jackson* (1963) 222 Cal.App.2d 296, 298 [attempted robbery conviction upheld where evidence established that defendant entered store, pointed a gun at store operator, and said only, 'This is it.']; *People v. Gilbert* (1963) 214 Cal.App.2d 566, 567-568 [where two armed men appeared in market shortly after closing time and simultaneously displayed their weapons, one pointing at proprietor near cash drawer and the other herding remaining occupants to rear room, lack of phrase such as 'this is a stickup' or 'hand over your money' does not bar the reasonable inference that a forceful taking of property was intended].) Although Zavala testified that it was Garcia who demanded where 'it' was, the jury could reasonably infer from all the testimony given by Zavala that the attackers coordinated their efforts in a joint plan to rob the brothers. The circumstances additionally supported the inference that the attackers would have succeeded in that plan had it not been for the telephone ringing. (Cf. *People v. Zapien*, *supra*, 4 Cal.4th at p. 984 [upholding special circumstance finding that defendant murdered victim during commission of attempted robbery and burglary where jury could reasonably conclude that defendant fled without money or valuables because he knew police had been telephoned].) Contrary to defendant's assertions, there is nothing fanciful or illogical about these inferences." (*People v. Rodrigues*, *supra*, 8 Cal.4th. at pp. 1129-1130, fn. omitted.)

We disagree with defendant's claims that *Rodrigues* and the cases relied on in *Rodrigues* are readily distinguishable from what occurred here. In particular, in *People v. Gilbert* (1963) 214 Cal.App.2d 566 the court rejected the defendant's argument that the only

fair inference was that an assault or battery upon the victim (Eng) was intended. The court stated, "But there is direct evidence that Eng did not know defendant, and a strong implication that he had never seen Swift [a coperpetrator]. The more reasonable inference, and that drawn by the jury, is that robbery was intended." (*Id.* at pp. 567-568.)

Here, two gang members armed with a gun surprised the victim as he exited his vehicle in the privacy of his front yard. The victim was alone and was driving a nice vehicle.[5] The victim did not have any gang associations nor did it appear that he was known by the defendants. Defendant pointed a gun at the victim and Hernandez hit him in what could be inferred as an attempt at coercive compliance to give up his property. Diana D. did not hear gunshots until she was inside of her house. Thus, there was a break in time from the time defendant and Hernandez approached the victim until he was shot. It is reasonable to assume that if this was purely a gang killing or a random murder, with no other intent, the victim would have been immediately shot and killed. The fact that defendant and Hernandez did not make a verbal demand for the victim's property does not bar the reasonable inference that a forceful taking of property was intended. In addition, the fact that defendant and Hernandez fled the scene without actually taking anything does not defeat the inference that they intended to rob the victim because it is a reasonable inference that they hurriedly fled the scene when their plans went astray and the victim was shot, knowing that the firing of the gun would bring the quick attention of neighbors and law enforcement. (See *People v. Rodriques, supra*, 9 Cal.4th at pp. 1130, *People v. Zapien, supra*, 4 Cal.4th at p. 984.) Although the quantum of evidence to prove attempted robbery without resort to Holt's testimony is slight, the circumstantial evidence is sufficient to meet the people's burden of proving the corpus delecti of the attempted robbery.

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[5] Although Holt testified regarding the nice appearance of the vehicle, the condition of the vehicle was corroborated by the photographs of the truck admitted into evidence.

Because the evidence supported the inference that an attempted robbery took place, we must determine if corroborating evidence linked defendant to the commission of the attempted robbery. "'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' [Citation.]" (*People v. Zapien, supra,* 4 Cal.4th at p. 982.)

Defendant was clearly linked to the attempted robbery by evidence separate and apart from Holt's testimony. An eyewitness identified defendant as the person with the gun. The gun that was likely the gun used in the crime was linked to defendant. Defendant was stopped in a car matching the description of the car that drove from the scene of the crime. Defendant made false statements to police when he was stopped. The evidence was sufficient to connect defendant to the commission of the offense "'in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'" (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.) The fact that the attempted robbery and the murder occurred contemporaneously results in a situation where the independent evidence that corroborates the murder also acts as the evidence that corroborates the attempted robbery. The identification of defendant as the person holding the gun, the association of the gun to the crimes and to the defendant, the linking of defendant to the car seen fleeing the scene of the murder, simultaneously corroborate Holt's testimony that a killing and an attempted robbery occurred.

Because Holt's testimony regarding the attempted robbery was sufficiently corroborated without resort to the "testimony" of Ruelas and his inconsistent statement entered into evidence after he "testified," it is not necessary for us to determine the multiple issues flowing from defendant's argument that the prior inconsistent statements of Ruelas were not admissible because Ruelas did not take an oath or make an affirmation when he "testified."

II. Constitutionality of Felony-Murder Special Circumstance

Defendant contends that the robbery felony-murder special circumstance violates the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment right to due process of law because it fails to provide a meaningful basis for distinguishing between those murderers deserving life without the possibility of parole or death from those who do not.

We need not further discuss defendant's argument because the California Supreme Court has "consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195.) The felony-murder special circumstances provide a meaningful basis for narrowing death eligibility. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1138.) We are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Having rejected the argument as to death penalty cases, the argument would clearly be rejected for cases involving the imposition of the penalty of life without the possibility of parole.

III. Imposition of Section 12022.53 Gun Enhancement

In addition to the term of life without the possibility of parole for the special circumstance murder, the trial court enhanced this sentence by a term of 25 years to life for the personal discharge of a firearm resulting in death. (§ 12022.53, subd. (d).)

Defendant contends the language of the enhancement statute prohibits the imposition of a term of 25 years to life when the underlying term results in imprisonment for life without the possibility of parole.

In his reply brief defendant acknowledges that since the time he filed his opening brief the California Supreme Court in *People v. Shabazz* (2006) 38 Cal.4th 55 decided this issue adversely to him. "With regard to the sentence enhancement of 25 years to life embodied in section 12022.53(d), we are of the view that the enhancement may be imposed

notwithstanding the circumstance that defendant's sentence for the underlying felony is life imprisonment without the possibility of parole. To hold otherwise would contravene both the plain language and the legislative intent underlying section 12022.53 as a whole, and would exempt more serious offenders from a punishment imposed upon less serious offenders." (*Id.* at p. 59.)

IV. Principles of Merger and Section 654 to Firearm Enhancement

Defendant states that unquestionably the proximate cause of the victim's death was the intentional discharge of a firearm. He contends that because the same facts underlie his first degree murder with use of a firearm conviction, his felony-murder special circumstance finding and the gun enhancements under section 12022.53, subdivisions (c) (personal discharge of a firearm) and (d) (personally discharge of a firearm proximately causing death), it was error for the trial court to augment his punishment for his convictions with the term imposed for the firearm enhancement. He claims that to hold otherwise would be inconsistent with established principles of merger and sections 654 and 954.

Defendant acknowledges that his arguments were rejected in *People v. Sanders* (2003) 111 Cal.App.4th 1371, 1373-1375, but argues that the reasoning in *Sanders* is unpersuasive. We find the reasoning in *Sanders* to be persuasive and reject defendant's argument. (See also *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1311-1315.)

Defendant also argues that the firearm enhancements are subsumed in his conviction for murder with special circumstances under the accusatory pleading test and must be vacated.

The California Supreme Court recently held in *People v. Reed* (2006) 38 Cal.4th 1224 that the accusatory pleading test for lesser included offenses does not apply in deciding whether multiple convictions are allowable for a single course of conduct. (*Id.* at p. 1229.)

V. Stayed Firearm Enhancements

The information alleged a series of firearm enhancements against defendant. The jury found that defendant personally used a firearm within the meaning of section 12022.5; personally used a firearm within the meaning of section 12022.53, subdivision (b); personally and intentionally discharged a firearm within the meaning of section 12022.53 subdivision (c); and personally and intentionally discharged a firearm causing death within the meaning of section 12022.53, subdivision (d).[6]

The court imposed a term of 25 years to life for the section 12022.53, subdivision (d) enhancement. It imposed the required term on the remaining firearm enhancements and then stayed the terms under the authority of section 654.

Defendant asserts the trial court should have stricken rather than stayed all the lesser firearm enhancements.

Respondent concedes that section 12022.53, subdivision (f) requires that the section 12022.5 firearm enhancement should be stricken rather than stayed. But, respondent asserts that the section 12022.53, subdivisions (b) and (c) enhancements were properly stayed pursuant to section 12022.53, subdivision (h).

Section 12022.53, subdivisions (f) and (h) contain what appear to be conflicting provisions on how to treat the gun findings that result in the shorter terms of imprisonment. These subdivisions provide:

"(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the

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[6] In addition it was found as to each of the section 12022.53 gun enhancements that a principal in the offense used the weapon for the benefit of or in association with a criminal street gang, thus making all of the gun enhancements applicable to any principal, not just the principal who personally and intentionally used the weapon. (§§ 186.22 and 12022.53, subd. (e).)

longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).

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"(h) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

The court in *People v. Bracamonte* (2003) 106 Cal.App.4th 704 attempted to harmonize the conflicts between subdivisions (f) and (h) and concluded "that section 12022.53 operates to require the trial court to add the applicable enhancement for each firearm discharge and use allegation under that section found true and then to stay the execution of all such enhancements except for the one which provides the longest imprisonment term. [Citation.]" (*Bracamonte, supra,* at p. 713.)

We disagree with *Bracamonte* and find the reasoning in *People v. Gonzalez* (Aug. 29, 2006, C045935) ___ Cal.App.4th ___ [2006 DJDAR 11618.] to be the more persuasive analysis of this issue. As noted in *Gonzalez*, subdivision (g) of section 12022.53 is between subdivisions (f) and (h) and the three should be read in context. Subdivision (g) provides: "[n]otwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section."

"Read in context, considering its placement within the section, and using common sense construction, we conclude that subdivision (h) prohibits the court from exercising discretion to strike an allegation or finding under section 12022.53. It is not meant to prohibit the court from striking a superfluous lesser enhancement under this same section. By its plain language, subdivision (h) prohibits striking the enhancement or finding

'[n]otwithstanding Section 1385 or any *other* provision of law[.]' (Italics added.) The statute does not prohibit the striking of the finding in accordance with *this* provision of law." (*People v. Gonzalez, supra,*___ Cal.App.4th at p.___ [2006 DJDAR at p. 11620].)

The situation here is not different in any meaningful respect from the rule applicable to convictions of both a greater and a lesser included offense. The convictions for the lesser offenses cannot stand. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) The People are not prejudiced by striking the lesser superfluous enhancements because if the greater enhancement is reversed or otherwise invalidated on a ground not applicable to the lesser enhancements, the lesser enhancements would be reinstated. (*People v. Gonzalez, supra*, ___ Cal.App.4th at p.___ [2006 DJDAR at p. ___].)

The trial court erred in staying the superfluous enhancements. The trial court should have stricken the section 12022.5, 12022.53, subdivision (b), and 12022.53, subdivision (c) enhancements.

VI. Gang Enhancement

In addition to the section 190.2, subdivision (a)(22) gang special circumstance, defendant admitted the criminal street gang enhancement pursuant to section 186.22. The court imposed a 10-year gang enhancement and then stayed the enhancement.

Defendant contends, and respondent concedes, that the trial court erred in staying the gang enhancement instead of striking it. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1011; *People v. Flores* (2005) 129 Cal.App.4th 174, 187.)[7]

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[7] In *Lopez* the court held that the gang enhancement must be stricken and a defendant should instead be subject to the exception in section 186.22, subdivision (b)(5). It provides: "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." Because defendant was sentenced to a term of life without the possibility of parole, it appears that subdivision (b)(5) does not apply to him. Respondent does not argue otherwise and *Lopez* appears to support this position. In discussing which life terms the exception in subdivision (b)(5) applied to, the court stated, "at the time the STEP Act was enacted, the predecessor to section 186.22(b)(5) was understood to apply to *all* lifers, except those sentenced to life without the possibility of

DISPOSITION

The trial court is ordered to correct the abstract of judgment by striking the sections 12022.5, 12022.53, subdivision (b); 12022.53, subdivision (c); and 186.22 enhancements and to forward corrected copies of the abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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DAWSON, J.

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parole …. [W]e find no indication that the voter-approved amendment in June 1998 to section 190, subdivision (e), which eliminated postsentence credits and thereby increased MEPD [minimum eligible parole dates] for first and second degree murderers, impliedly altered the meaning of 'a felony punishable in the state prison for life' in that predecessor provision. [Citation.]" (*People v. Lopez, supra,* 34 Cal.4th at p. 1010.)